Toffoloni v. LFP Publishing Group, LLC Doc. 73 Att. 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, vs. **LFP PUBLISHING GROUP, LLC,** d/b/a Hustler Magazine, et al, Defendant.	)))))))))))))	CASE NO. 1:08-cv-00421-TWT

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PROTECTIVE ORDER

EXHIBIT B

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December 16, 2009

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AND HAND DELIVERY

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Re: *Toffoloni v. LFP Publishing Group, LLC*
N.D. Ga. Case No. 1:08cv0421-TWT

Dear Rick:

This responds to your December 9, 2009 letter regarding LFP Publishing Group, LLC's ("LFP's") responses to Plaintiff's First Interrogatories and Request for Production of Documents.

"Punitive Damages" Requests

Your letter takes issue with LFP's objections asserted in response to Plaintiff's Interrogatories Nos. 7 through 9, and Document Requests Nos. 2 through 7, which requests collectively seek "[f]or purposes of Plaintiff's claim for punitive damages" financial and net worth information regarding LFP and non-party corporations LE Publishing, LLC and L.F.P., Inc. (Interrogatory No. 2 relates to the identification of expert witnesses, and we assume is referenced in your letter by mistake.) For the reasons set forth below, LFP continues to believe Plaintiff's "punitive damages" discovery is improper here.

1. Requests regarding non-parties LE Publishing, LLF and L.F.P., Inc.

As LFP's objections to Plaintiff's Interrogatories Nos. 8 & 9 and Document Requests Nos. 3, 4, 6 & 7, make clear, non-parties LE Publishing, LLC and L.F.P., Inc., are separate and distinct legal entities from LFP, and even were these entities proper sources of discovery in this case (which they are not), Plaintiff's effort to obtain discovery from these non-parties through requests to LFP is improper. Your letter offers no reason to disregard corporate formalities. Plaintiff does not allege either of these non-parties published any images of Ms. Benoit. Plaintiff gives no reason why any discovery from these non-parties is relevant, much less appropriately directed to LFP. With respect to Interrogatories Nos. 8 & 9 and Document Requests Nos. 3, 4, 6 & 7, LFP has no responsive documents or information and stands on its objections.

2. Requests regarding LFP

As to the net worth and financial information of LFP (Plaintiff's Interrogatories No. 7 and Document Requests Nos. 2 & 5), you argue that this information is relevant and discoverable because LFP "was fully aware at the time of publication that publishing nude photographs of Nancy Benoit was a clear violation of Plaintiff's right of publicity," that LFP published the images "despite Plaintiff's [January 16, 2008] warning" to the contrary, and because "Plaintiff properly prayed specifically for punitive damages in her Verified Complaint." Your recollection of the facts is mistaken, however, and it remains the case that there is no set of facts which Plaintiff has alleged or could allege that would support an award of punitive damages in this case.

First, you appear to take issue with our citation to *Cabaniss v. Hipsley* for the legal standard governing an award of punitive damages for violation of the Georgia right of publicity, which requires "that the acts of the defendant have been of such a character to import premeditation or knowledge and consciousness of the appropriation and its continuation." 114 Ga. App. 367, 386-387 (1966). However, the case you cite as authorizing punitive damages here -- *Alonso v. Parfet* -- actually cites to *Cabaniss* and quotes this very same language as the appropriate standard for awarding such damages. 253 Ga. 749, 750 (1985). We therefore assume we are in agreement as to the legal standard applicable to Plaintiff's claim for punitive damages in this case, and that "premeditation or knowledge and consciousness of the appropriation [of Ms. Benoit's likeness] and its continuation" must be alleged and proven to support Plaintiff's claim here.[1]

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[1] We also note that your letter cites several Georgia and U.S. Supreme Court cases regarding punitive damages that pre-date the U.S. Supreme Court decision in *State Farm Mutual Ins. Co. v. Campbell*, 538 U.S. 408 (2003), which case makes clear that, even assuming *arguendo* that punitive damages would be available to Plaintiff in this case, such damages would be limited by the U.S. Constitution to a small multiple of actual

(footnote continued on next page)

To that end, as the correspondence exchanged between you and counsel for LFP in January 2008 makes clear, the March 2008 issue of *Hustler* Magazine (which included the article about and images of Ms. Benoit) was printed, delivered to subscribers, and available for retail purchase by the public on January 8, 2008, well before your January 16, 2008 demand letter was sent and Plaintiff's February 5, 2008 Complaint and Motion for Temporary Restraining Order were filed. (In fact, the April 2008 issue of *Hustler* had already been distributed and made available for sale, and the March 2008 issue taken off the shelves, by the time Plaintiff's lawsuit was filed.) Thus your assertion that LFP "heedlessly proceeded" to publish the images of Ms. Benoit "[d]espite Plaintiff's warning" is untrue.

Further, as you know, despite having no legal obligation to do so, after learning of Plaintiff's complaint, LFP voluntarily agreed that it would not republish the images of Ms. Benoit in any future issues of *Hustler* Magazine or authorize or license republication of the images by any other licensees. (*See* Exhibit A to LFP Opposition to Plaintiff's Motion for TRO.) Thus there was no "continuation" of the alleged appropriation -- even though LFP has always believed it had the right to publish the images.

Indeed, LFP believed -- and still believes -- in good faith that its publication of the images of Ms. Benoit is privileged under the First Amendment to the U.S. Constitution as part of a legitimate news article on her life and career. That this belief was reasonable at the time LFP made its decision to publish the article about and images of Ms. Benoit cannot be seriously disputed where the District Court agreed that the Constitution protected the publication at issue in this case.

In short, in these circumstances, Plaintiff lacks any factual basis to allege that LFP acted with the requisite premeditation and malicious intent required to justify a claim for punitive damages. Accordingly, her requests for financial information of LFP are improper and LFP will not withdraw its objections to producing such information.

We understand from your letter that you may choose to file a motion to compel LFP to produce this information. We ask you not to do so, as we believe such a motion would be frivolous for the reasons described above. Please also be advised that, in the event you do file such a motion, LFP will promptly seek a protective order and move for summary judgment on Plaintiff's claim for punitive damages.

(footnote continued from previous page)

damages. Thus, particularly where, as here, alleged actual damages would be *de minimis*, the wealth and assets of LFP, or its non-party affiliates, is not relevant.

Information Regarding Payments to Models/Celebrities

As indicated in it's objections to Plaintiff's Interrogatory No. 14 and Document Request No. 8, LFP believes these requests, as framed, to be overly broad and to seek commercially-sensitive information. However, we do agree with your position that "[t]he payments made to other celebrities, actors or other performers or private individuals for the use of nude photographs in *Hustler* [M]agazine" provides the correct "basis for the determination of actual damages sustained by Plaintiff" should she prevail in establishing liability in this case.

Therefore, subject to entry of an appropriate protective order governing the use of confidential information exchanged by the parties, LFP will identify the amounts it has paid to other celebrities, public figures, actors, models, private individuals and performers for the use of their nude images in issues of *Hustler* Magazine for the years 2006 to present. A proposed joint consent protective order to govern the production of such commercially-sensitive information is enclosed herewith for your consideration.

* * *

Please also find enclosed herewith additional documents responsive to Plaintiff's discovery requests, as well as LFP's First Supplemental Responses to Plaintiff's Interrogatories.

Very truly yours,

S. Derek Bauer

Enc.
cc: *Via email, w/enc.*
Paul J. Cambria, Jr., Esq.
Jeffrey Reina, Esq.
William M. Feigenbaum, Esq.
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